IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 930 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
JASWANTSINH ANDARSINH MAKWANA - Opponent(s)

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Appearance :
MR MUKESH PATEL APP for Appellant(s) : 1,
MR SK PATEL for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 01/12/2006

ORAL JUDGMENT

1. Heard Shri Patel learned APP for the appellant-State of Gujarat and learned advocate Shri Sheth for Shri S.K.Patel for the respondent-accused.

2. The appellant-State of Gujarat has preferred

this appeal u/s.378 of the Criminal Procedure Code (hereinafter referred to as the Code for the brevity) challenging the judgment and order of acquittal dated 15/7/1996 passed by the Judicial Magistrate First Class, Prantij in Criminal Case No.432/87 acquitting the present respondent-original accused of the charge of commission u/s. 409, 477-A of I.P.C. The leave was granted and appeal was admitted (coram: A.N.Divecha, J.) dated 17th January, 1997. The case of the appellant deserves to be set out as under:

2.1. The accused at the relevant time was serving as Talati cum Mantri at village Roopal in the year 1985-86. The Taluka Development Officer, Prantij lodged complaint before the concerned police station against the present respondent-original accused on 15th March, 1986 alleging that the accused had committed offence punishable u/s. 409, 477-A of I.P.C. of temporarily mis-appropriating the tax money and not depositing in time while discharging his duties as Talati cum Mantri for the period about 12/5/1983. The First Information Report came to be registered as FRI-34/86. The investigation was carried out and ultimately the police filed charge sheet before the concerned Court in Criminal Case No.432/87. The concerned Court framed charges at Exh.18 on 20th January, 1988 that the accused while discharging his duties as Talati cum Mantri from 12/5/1983 to 10/3/1986 at Prantij temporarily mis-appropriated an amount of Rs.1748.27 ps. which was recovered as land revenue and education cess and not

depositing it in the treasury and tempering with receipt punishable u/s. 409 and 477-A of I.P.C. The accused plea was recorded at Exh.19 who pleaded not guilty and came to be tried. After recording the case of the prosecution, the accused further statement came to be recorded u/s. 313 of the Cr.P.C. wherein the accused denied the case of the prosecution. The Trial Court has come to the conclusion that as prosecution has failed in proving its case beyond reasonable doubt the accused deserves to be acquitted and accordingly he is acquitted of the charge of commission of offence u/s. 409 and 477 A of the I.P.C. with the judgment and order dated 15th July, 1996. The same is impugned in the present appeal u/s. 378 of the Code.

3. Shri Patel learned APP has submitted that the accused though has in fact deposited the money received by way of tax and educational cess he cannot be acquitted of offence of mis-appropriation. The Trial Court has wrongly come to the conclusion that the prosecution has not proved its case beyond reasonable doubt. Shri Patel has submitted that the accused being public servant was required to be proceeded against only after obtaining the valid sanction and in the instant case the testimony of the complainant show that such sanction for lodging prosecution had been issued by the Competent Authority. Shri Patel has submitted that the finding of the Trial Court is otherwise also erroneous and the same is required to be reserved.

Shri Patel submitted that the small amount of mis-appropriation might not be the criterian for acquittal. Shri Patel has submitted that the decision of the Trial Court is contrary to the evidence on record and, therefore, the same deserves to be reserved. Shri Patel has submitted that in view of the erroneous decision of the Trial Court this Court may reserve the finding of the Trial Court and as the factum of temporary mis-appropriation is proved beyond doubt the accused be convicted and be inflicted with proper perspective punishable under the law.

4. Shri Sheth for the present respondent-original accused has submitted that this appeal deserves to be dismissed on the ground of serious infirmity in the case of the prosecution. The infirmity is so serious as to prejudice the accused and, therefore, the same cannot be cured in the acquittal appeal. Shri Sheth has submitted that the prosecution has failed in establishing valid sanction for lodging prosecution against the present respondent-original accused. Shri Sheth has invited this Court's attention to the testimony of complainant wherein he has stated that the District Development Officer had issued orders for lodging the complaint against the present respondent and that the order was at mark A/1. The document on record at mark A/1 appears to be an order issued by Dy.District Development Officer suspending the present respondent-original accused and, therefore, the same cannot be by any stretch of

imagination treated as sanction as envisaged u/s. 197 of the Code. Shri Sheth has submitted that mere statement of the complainant in his testimony that the sanction was accorded on 10th March, 1986 in itself would not constitute valid sanction for prosecution in absence of any document of sanction proved and exhibited on the record. Shri Sheth has relied upon the decision of the Apex Court in the case of **Shreekantiah Ramayya Munipalli & Anr. vs. State of Bombay reported in AIR 1955 Supreme Court 287** and also in the case of **Amrik Singh vs. State of Pepsu reported in AIR 1955 Supreme Court 309** in support of his case that the sanction is required from the competent authority for lodging and maintaining the prosecution against the public servant. Shri Sheth has submitted that in the instant case it is not in dispute by the appellant that the sanction was not required for maintaining and lodging the prosecution against the accused as the charge itself would go to show that the sanction was required to be obtained for lodging the prosecution. Shri Sheth has referred the decision in the case of **Matajog Dobey vs. H.C.Bhari and Nand Ram Agarwal vs. H.C.Bahi & Ors. reported in AIR 1956 Supreme Court 44** and in the case of **S.B.Saha & Ors. vs. M.S.Kochar reported in AIR 1979 Supreme Court 1841** and in the case of **P.K.Roshan vs. State of Gujarat reported in 2005(3) GLR 1894** in support of his submission that in absence of requisite sanction from the concerned authority the prosecution against the public servant stands vitiated. Shri Sheth has

submitted that the dis-honesty in withholding of money is essential ingredient required to be established beyond reasonable doubt by the prosecution for bringing-home the ultimate charge of tempory mis-appropriation against the public servant. In support of his submission Shri Sheth has referred to the decision in the case of **Narendra Pratap Narain Singh & Anr. vs. State of U.P, reported in AIR 1991 Supreme Court 1394.** Shri Sheth submits that in view of this facts and circumstances, the order of acquittal deserves to be sustained and the appeal deserves to be dismissed.

5. This Court has perused the record and heard the counsels of the parties at length. The Court is mindful that this being acquittal appeal no interference is required unless and until it is established by the appellant that the finding and reasoning of the Trial Court are so perverse as to result into miscarriage of justice. In the instant case it deserves to be noted that the prosecution has miserably failed in bringing on record and proving due sanction for lodging prosecution against the respondent-original accused. Shri Patel was categorically asked to point out from the record the letter of sanction even at this stage in acquittal appeal. Shri Patel could not point out any document from the record which could be interpreted as valid sanction u/s.179 of the Code for lodging prosecution. Shri Patel has invited this Court's attention to the testimony of the complainant wherein he has stated

that the sanction was accorded for lodging the prosecution by the competent authority vide a letter dated 10th March, 1986. However, he could not show from the record any letter dated 10th March, 1986 according sanction for lodging the prosecution against the accused. This appeal deserves to be dismissed only on this count. In the instant case as it is stated hereinabove the prosecution has miserably failed in pointing out any sanction on record, even the appellant at this stage have not been in a position to point out any document from the record purporting to the sanction-letter sanctioning prosecution against the present appellant-original accused. In view of this the appeal deserves to be dismissed.

6. In the result and as it is discussed hereinabove this Court is of the considered view that the appellant as well as the prosecution has failed in establishing beyond doubt the existence of sanction as it has not come out of the record and, therefore, the order of acquittal dated 15/7/1996 in Criminal Case No.432/87 impugned in the present appeal does not call for any interference and, therefore, the appeal fails and it deserves to be dismissed and is dismissed accordingly.

(S.R.BRAHMBHATT, J.)

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